

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUAN MOLINA, JR.,

Petitioner,

v.

M. GAMBOA,

Respondent.

Case No. 1:21-cv-00215-JLT-HBK (HC)

FINDINGS AND RECOMMENDATIONS TO
DENY PETITIONER'S PETITION AND
DECLINE TO ISSUE A CERTIFICATE OF
APPEALABILITY¹

FOURTEEN-DAY OBJECTION PERIOD

I. STATUS

Petitioner Juan Molina, Jr. ("Petitioner" or "Molina"), a state prisoner, is proceeding pro se on his Petition for Writ of Habeas Corpus filed under 28 U. S.C. § 2254 on February 12, 2021. (Doc. No. 1, "Petition"). The Petition challenges Petitioner's judgment of conviction entered by the Kern County Superior Court (case no. BF159213A) for second degree murder (count 1) and destruction or concealment of evidence (count 2) for which Petitioner was sentenced to an indeterminate 15 year to life sentence (count 1) and a concurrent term of 180 days (count 2). (*Id.* at 1).² The Fifth Appellate District Court affirmed Molina's judgment on direct appeal (Case No.

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

² All citations to the pleadings and record are to the page number as it appears on the Case Management and Electronic Case Filing ("CM/ECF") system.

1 F074033). (Doc. No. 18-18). On August 24, 2022, the California Supreme Court summarily
2 denied Molina's petition for review (Case No. S257907). (Doc. No. 18-20).

3 The Petition advances the following (restated) grounds for relief:

4 (1) The State failed to disclose exculpatory evidence in violation of
5 *Brady v. Maryland*, 373 U.S. 83 (1963);
6 (2) The prosecutor committed misconduct by introducing known
7 perjured testimony in violation of Petitioner's right to a fair trial;
8 (3) Trial and appellate counsel rendered constitutionally ineffective
9 assistance when:
10 (a) Trial counsel failed to introduce the Sprint cell phone
11 bill; failed to investigate the cell phone records; and failed
12 to object to Ortiz' "second statement";
13 (b) Appellate counsel failed to raise on appeal the
14 Petitioner's cell phone claim and failed to file a state
15 habeas petition on Petitioner's behalf;
16 (4) There was insufficient evidence of malice aforethought to
17 support Petitioner's second-degree murder conviction.

18 (See generally Doc. No. 1 at 18-19). Respondent filed an Answer (Doc. No. 17) and lodged the
19 state court record in support (Doc. No. 18, 18-1 through 18-26). Petitioner filed a Reply to the
20 Answer. (Doc. No. 21). This matter is deemed submitted on the record before the Court. After
21 careful review of the record and applicable law, the undersigned recommends the district court
22 deny Petitioner relief on his Petition and decline to issue a certificate of appealability.

23 **II. GOVERNING LEGAL PRINCIPLES**

24 **A. Evidentiary Hearing**

25 In addition to requesting the Court to grant the Petition, Petitioner seeks an evidentiary
26 hearing in his Petition. (Doc. No. 1 at 16). Petitioner does not elaborate on which claim(s) he
27 requests an evidentiary hearing nor the reasons why an evidentiary hearing is necessary. "In
28 deciding whether to grant an evidentiary hearing, a federal court must consider whether such a
hearing could enable an applicant to prove the petition's factual allegations, which, if true, would
entitle the applicant to federal habeas relief." *Schrivo v. Landrigan*, 550 U.S. 465, 474 (2007).
"It follows that if the record refutes the applicant's factual allegations or otherwise precludes
habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* Here, the state

1 courts adjudicated each of Petitioner’s claims on the merits. This Court finds that the pertinent
2 facts of this case are fully developed in the record before the Court; thus, no evidentiary hearing
3 is required. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

4 **B. AEDPA General Principles**

5 A federal court’s statutory authority to issue habeas corpus relief for persons in state
6 custody is set forth in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death
7 Penalty Act of 1996 (AEDPA). AEDPA requires a state prisoner seeking federal habeas relief to
8 first “exhaus[t] the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). If
9 the state courts do not adjudicate the prisoner’s federal claim “on the merits,” a *de novo* standard
10 of review applies in the federal habeas proceeding; if the state courts do adjudicate the claim on
11 the merits, then the AEDPA mandates a deferential, rather than *de novo*, review. *Kernan v.*
12 *Hinojosa*, 136 S. Ct. 1603, 1604 (2016). This deferential standard, set forth in § 2254(d), permits
13 relief on a claim adjudicated on the merits, but only if the adjudication:

14 (1) resulted in a decision that was contrary to, or involved an
15 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable
17 determination of the facts in light of the evidence presented in the
State court proceeding.

18 28 U.S.C. § 2254(d). This standard is both mandatory and intentionally difficult to satisfy.
19 *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018); *White v. Woodall*, 572 U.S. 415, 419 (2014).

20 “Clearly established federal law” consists of the governing legal principles in the
21 decisions of the United States Supreme Court when the state court issued its decision. *White*, 572
22 U.S. at 419. Habeas relief is appropriate only if the state court decision was “contrary to, or an
23 unreasonable application of,” that federal law. 28 U.S.C. § 2254(d)(1). A decision is “contrary
24 to” clearly established federal law if the state court either: (1) applied a rule that contradicts the
25 governing law set forth by Supreme Court case law; or (2) reached a different result from the
26 Supreme Court when faced with materially indistinguishable facts. *Mitchell v. Esparza*, 540 U.S.
27 12, 16 (2003).

28 A state court decision involves an “unreasonable application” of the Supreme Court’s

1 precedents if the state court correctly identifies the governing legal principle, but applies it to the
 2 facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S.
 3 133, 134 (2005), or "if the state court either unreasonably extends a legal principle from
 4 [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to
 5 extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362,
 6 407, (2000). "A state court's determination that a claim lacks merit precludes federal habeas
 7 relief so long as fair-minded jurists could disagree on the correctness of the state court's
 8 decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The petitioner must show that the
 9 state court decision "was so lacking in justification that there was an error well understood and
 10 comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 103.

11 When reviewing a claim under § 2254(d), any "determination of a factual issue made by a
 12 State court shall be presumed to be correct [,]" and the petitioner bears "the burden of rebutting
 13 the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Burt*
 14 *v. Titlow*, 571 U.S. 12, 18 (2013) ("[A] state-court factual determination is not unreasonable
 15 merely because the federal habeas court would have reached a different conclusion in the first
 16 instance.") (quoting *Wood v. Allen*, 558 U.S. 290, 293 (2010)).

17 Even if a petitioner meets AEDPA's "difficult" standard, he must still show that any
 18 constitutional error had a "substantial and injurious effect or influence" on the verdict. *Brecht v.*
 19 *Abrahamsen*, 507 U.S. 619, 637 (1993). As the Supreme Court recently explained, while the
 20 passage of AEDPA "announced certain new conditions to [habeas] relief," it didn't
 21 eliminate *Brecht*'s actual-prejudice requirement. *Brown v. Davenport*, — U.S. —, 142 S. Ct.
 22 1510, 1524, 212 L.Ed.2d 463 (2022). In other words, a habeas petitioner must satisfy *Brecht*,
 23 even if AEDPA applies. *See id.* at 1526 ("[O]ur equitable precedents remain applicable 'whether
 24 or not' AEDPA applies.") (*citing* *Fry v. Pliler*, 551 U.S. 112, 121, 127 S.Ct. 2321, 168 L.Ed.2d
 25 16 (2007)). In short, a "federal court must deny relief to a state habeas petitioner who fails to
 26 satisfy either [*Brecht*] or AEDPA. But to grant relief, a court must find that the petition has
 27 cleared both tests." *Id.* at 1524.

1 As discussed *supra*, for the deferential § 2254(d) standard to apply there must have been
 2 an “adjudication on the merits” in state court. An adjudication on the merits does not require that
 3 there be an opinion from the state court explaining the state court’s reasoning. *Richter*, 562 U.S.
 4 at 98. “When a federal claim has been presented to a state court and the state court has denied
 5 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence
 6 of any indication or state-law procedural principles to the contrary.” *Id.* at 99. “The presumption
 7 may be overcome when there is reason to think some other explanation for the state court’s
 8 decision is more likely.” *Id.* at 99-100. This presumption applies whether the state court fails to
 9 discuss all the claims or discusses some claims but not others. *Johnson v. Williams*, 568 U.S.
 10 289, 293, 298-301 (2013).

11 While such a decision is an “adjudication on the merits,” the federal habeas court must
 12 still determine the state court’s reasons for its decision to apply the deferential standard. When
 13 the relevant state-court decision on the merits is not accompanied by its reasons,

14 the federal court should “look through” the unexplained decision to
 15 the last related state-court decision that does provide a relevant
 16 rationale. It should then presume that the unexplained decision
 17 adopted the same reasoning. But the State may rebut the
 18 presumption by showing that the unexplained affirmation relied or
 most likely did rely on different grounds than the lower state court’s
 decision, such as alternative grounds for affirmance that were
 briefed or argued to the state supreme court or obvious in the record
 it reviewed.

19 *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The federal court “looks through” the silent state
 20 court decision “for a specific and narrow purpose—to identify the grounds for the higher court’s
 21 decision, as AEDPA directs us to do.” *Id.* at 1196.

22 **III. RELEVANT FACTUAL BACKGROUND**

23 Petitioner was charged by Information with first-degree murder (count 1, Penal Code, §§
 24 187, 189); destruction or concealment of evidence (count 2, Penal Code § 135); and the
 25 enhancement that during the commission of the murder, defendant personally discharged a
 26 firearm causing the death of another person (Penal Code, § 12022.53(d)). (Doc. No. 18-1 at 77-
 27 79). The jury convicted Petitioner of the lesser-included offense of second-degree murder and
 28 destroying evidence. (Doc. No. 18-2 at 9-18).

The Court adopts the pertinent facts concerning the underlying offenses, as summarized by the California Fifth District Court of Appeal on direct appeal. (Doc. No. 18-18). A presumption of correctness applies to these facts. *See* 28 U.S.C. § 2254(e)(1); *Crittenden v. Chappell*, 804 F.3d 998, 1010-11 (9th Cir. 2015).

FACTS

Background

The incident underlying this case involved several people, many of whom are related and share a last name. We begin by setting forth the relationships and living arrangements of the people involved. We will use first and/or last names as clarity dictates throughout this opinion.

In February 2015, Alexis Espinoza lived at a home on Fifth Street in Delano (the “Espinoza residence”). The following people also lived at the Espinoza residence: Alexis’s mother; Alexis’s sister Samantha Espinoza and her boyfriend Jesse Sandoval; Alexis’s other sister Sabrina Espinoza and her boyfriend Adrian Garner; and several children.

At the same time, in February 2015, defendant lived at a home on 19th Avenue in Delano (the “Martinez residence”). The following people also lived at the Martinez residence: defendant’s wife Sabrina Martinez (who was also Alexis’s aunt); defendant’s mother-in-law Francis Martinez; defendant’s brother-in-law Arcadio Martinez [N.2] and his children.

[N.2] According to Alexis, Arcadio “would stay” at the Martinez residence but “wasn’t officially living there.”

One of Arcadio's children was named Angel Martinez. Angel Martinez had a friend, also named Angel. Several witnesses and the parties on appeal refer to Angel Martinez as "Cousin Angel" and to his friend as "Friend Angel." We will do the same.

Witnesses testified that Arcadio, Cousin Angel, Friend Angel, and Garner were gang members.

Percipient Witnesses' Version of Events

On the evening of February 14, 2015, several people gathered at the Espinoza residence.[N.3] Defendant and his wife Sabrina Martinez arrived between 8:00 and 9:00 p.m.

[N.3] Espinoza rejected the term “party,” in favor of the following description: “What it was was a few of my friends had came over and a few of my family members had come over after they had did their Valentine’s Day things with their significant others, since my birthday was the day before.”

1 At one point in the evening, defendant began “ranting” about how
 2 younger gangsters “aren’t really gangsters.” Defendant said
 3 younger gangsters are “kind of fake,” “don’t have any respect, and
 4 they “do stuff under peer pressure.”

5 Later that evening, while still at the Espinoza residence, defendant
 6 confronted Friend Angel about his tattoo with four dots under his
 7 eye. Friend Angel “got upset” and said something that defendant
 8 did not like. An altercation began, involving defendant, Friend
 9 Angel and Arcadio. One witness said the altercation involved
 10 “shoving” or “pushing,” while another said the “altercation” was
 11 “[j]ust arguing.” The witness who described “shoving,” said that
 12 defendant and Arcadio were going “back and forth” shoving each
 13 other. Then, Friend Angel “hopped in,” which resulted in “[m]ore
 14 pushing.”

15 Alexis Espinoza and Sabrina Martinez broke up the fight. Several
 16 people then forcefully removed defendant from the house. As he
 17 was pushed out the front door, defendant said to Arcadio, “You
 18 stupid mother f[**]ker. I’m going to get you. Just wait and see. I’m
 19 going to get you.” Another witness heard defendant say he would
 20 come back and hurt people in the house. Specifically, he said, “I
 21 will be back; so you guys watch out.”[N.4]

22 [N.4] The witness apparently did not tell responding
 23 Detective Scott about this comment at the scene or in an
 24 interview days later.

25 Sabrina Martinez told defendant they were going to talk about his
 26 behavior after they got home. They then left together. Later,
 27 Sabrina Martinez returned without defendant. She tried to get
 28 Arcadio to come outside of the house, claiming she was “trying to
 29 make peace.” However, Samantha wondered “why couldn’t they
 30 talk to him inside the house,” if all they really wanted to do was
 31 talk. Sabrina Martinez eventually said, “Just face him, you scared
 32 mother f[**]ker. Be a man and face him.”

33 Sabrina Martinez and Samantha began arguing. Sabrina Martinez
 34 yelled at Samantha Espinoza “telling her to mind her own F[‘]ing
 35 business and just calling her like a bitch and a whore and other
 36 stuff.” Alexis shoved Sabrina Martinez, who responded by
 37 “sock[ing]” her in the nose. As Alexis tended to her nose, Sabrina
 38 Martinez and Samantha started to physically fight one another.

39 Sabrina said, “He’s pissed and he’s going to come back with this
 40 and f[**]k all you guys.”[N.5] Sabrina Martinez was “ejected” from
 41 the house and began pacing on the sidewalk in front of the house.
 42 Around the same time, Garner, Sandra Ortiz (Garner’s sister), and
 43 Humberto Ortiz (Sandra’s husband) arrived at the residence. Garner
 44 was a Norteño gang member.

45 [N.5] The witness who testified to hearing the statement
 46 never told officers about it.

1 A witness saw Sabrina Martinez on a cell phone, and heard her say,
2 “You better hurry up, these mother f***kers think they are going to
3 laugh at us.” While still on the phone, Sabrina Martinez also made a
comment “toward” the Espinoza residence saying, “We are going to
come back and shoot all you mother f***kers.”[N.6]

4 [N.6] When Officer Ruben Campos interviewed Sandra
5 Ortiz shortly after the incident, she did not mention any
6 threats made by Sabrina Martinez at the residence or on her
cell phone.

7 Samantha received a call from Anthony Martinez – who lived with
8 defendant – saying defendant “came for the gun, and he’s on his
way back.” According to Alexis, the Espinoza and Martinez
residences are “[l]ike a ten-minute car ride” apart.

9 Samantha informed the other people at the Espinoza residence, who
10 were trying to lock up the house. Samantha heard Sandoval tell
11 Garner, “I have you,” or “I got your back.” Garner responded, “No,
carnal, let me handle it.”[N.7] The two then “bump[ed] heads.”

12 [N.7] According to Sandoval, “carnal” means “brother.”

13 Garner opened the front door, and defendant was standing there.
14 Defendant said, “What are you looking for, bro? Are you looking
15 for this?” and pulled out a gun. Garner did not have a gun in his
16 hand at the time, but one was later found in his waistband.
17 Defendant tried to walk in with the gun, but Garner tried to push
18 him out. The “back and forth” lasted less than a minute before the
19 gun defendant was holding discharged. Garner looked shocked, his
20 knees buckled, and he fell. Defendant ran away and got into his car.
21 As defendant drove away, someone fired several shots at his car.

22 Sometime later, a group of more than five Norteños came to the
23 Espinoza residence.

24 Several nurses initially approached the area to render assistance.
25 One of the nurses saw three or four men jumping and hollering in
26 the driveway. It appeared the men had guns in their waistbands.

27 Several of the nurses turned back, and only one nurse continued to
28 approach the scene in order to render aid to Garner. There was a
shotgun next to Garner’s body, which she had to move to render
aid. She also saw that Garner had a gun “in his pants.” A
responding officer testified the gun found in Garner’s waistband
was positioned so that it would not have been visible unless Garner
lifted his shirt.

29 Garner died, with a bullet having pierced his heart.

30 *Toxicologist*

31 A toxicologist testified that Garner’s blood-alcohol concentration
32 was 0.038 percent, and that the levels of Delta 9-THC in his blood
33 indicated Garner was under the effect of marijuana.

1 Other results indicated Garner had used cocaine sometime within
2 the past few days. The toxicologist could not say whether Garner
3 was “feeling the effects” of cocaine at the time of his death.

4 *Sabrina Martinez’s Version of Events*

5 Defendant’s wife, Sabrina Martinez, testified. She testified that
6 Arcadio had previously “[s]traight up” told her he was a
7 “Northerner” gang member. One night – before the incident at issue
8 here – Arcadio told defendant he was on a “list of Norteños.”
9 Arcadio was going to get him off the list so that the Norteños
10 “wouldn’t hurt him or beat him up.”

11 *Night of the Incident*

12 On the night of the incident, Sabrina Martinez said defendant
13 accompanied her to the Espinoza residence around 10:00 p.m.
14 While in the living room of the residence, defendant got into an
15 argument with Arcadio. Defendant told Arcadio he should be a
better father and a better son.

16 Later, defendant became involved in another argument away from
17 the living room. Sabrina Martinez was “sure” defendant was
18 arguing with Arcadio and assumed the argument had been taking
19 place in the backyard. Sabrina Martinez did not hear what was said
20 during this argument. The argument caused several people to
21 “throw[]” defendant out of the house. Sabrina Martinez decided to
22 leave with defendant. She did not hear defendant say anything as
23 they were leaving.

24 Sabrina Martinez and defendant drove around the block in their car.
25 Sabrina Martinez told defendant they needed to talk to Arcadio to
26 “clear the air.” They then returned to the Espinoza residence.
27 Sabrina Martinez got out of the car, while defendant remained in
28 the vehicle. She tried to get Arcadio to come outside so they could
“clear the air.” Arcadio refused to come outside. Alexis then
approached Sabrina Martinez, and “got into her face.” Sabrina
Martinez then hit Alexis in the nose. Sabrina Martinez then felt
something hit her in the head, and she could not see for a moment.
During this time, Sabrina Martinez was yelling indecipherably.

A group of people tried to “force” Sabrina Martinez “out.” When
she reached the front gate of the house, defendant and the car were
no longer there. She had left her phone in the car, so she walked to
her mother-in-law’s house.

Sabrina Martinez admitted she was drunk while at the Espinoza
residence.

25 *Defendant’s Version of Events*

26 Defendant testified. [N.8] Defendant associated with Northerner
27 gang members in his neighborhood when he was a teenager. Before
28 he turned 20, he “left that stuff alone” and “never looked back.”

1 [N.8] Defendant began his testimony by admitting he stole
2 electronics from Sears 12 years prior.

3 Arcadio told defendant he was a Northerner. Arcadio asked
4 defendant if he was “good,” meaning to ask whether defendant was
5 an active gang member. Defendant said, “No, Brother.” Arcadio
6 said he would talk to people “high up in the gang” to get defendant
7 removed from the gang’s “no-good list.” Arcadio said that if
8 defendant was not removed from the list, he would be killed.

9 On the night of February 14, 2015, defendant was conversing in the
10 backyard when he saw Arcadio, Cousin Angel and Friend Angel
11 come in through the front door. Arcadio came straight to the
12 backyard and said to defendant, “What’s up now?” Arcadio told
13 defendant he was “a no good piece of shit.” Defendant said Arcadio
14 needed to take care of his family and stop his gang banging “dumb
15 shit.” Then, Friend Angel “g[o]t in [defendant’s] face” and told
16 defendant to keep the Westside out of his mouth. Defendant noticed
17 some “dudes standing up, getting off the couch” who looked “like
18 they were ready to jump in, too.”

19 Arcadio and Friend Angel started pushing defendant out of the
20 house. Defendant told Arcadio he was going to “whip his ass” when
21 he came home. Defendant “mentioned nothing about no firearms.”
22 Defendant never said he would come back and shoot anyone at the
23 house.

24 Sabrina Martinez escorted defendant to the car. The two talked
25 about how they need to “fix” the situation with Arcadio because
26 they lived together. Sabrina Martinez got out of the car to apologize
27 to the people at the Espinoza residence. She told defendant to stay
28 in the car.

29 Sabrina Martinez went inside the Espinoza residence and the door
30 closed behind her. Two or three seconds after she went inside,
31 defendant heard her scream through an open window. Defendant
32 feared for his wife. Defendant “floored it” in his car and drove to
33 the Martinez residence. Defendant ran through every stop sign and
34 stoplight he came across. When he got to his house, he went into
35 his room and retrieved a .40-caliber handgun. Defendant then drove
36 back to the Espinoza residence.

37 Defendant got out of his car, but left the engine running. He
38 planned to get his wife and “get the hell out of there.” Defendant
39 approached the home from outside, and said, “Where’s my wife
40 at?” One of his nieces said, “She ain’t here.” Defendant took that as
41 his “cue” to “get out of town.”

42 Defendant had his pistol in his right hand, pointing it down. He
43 turned away to leave, when Garner grabbed defendant’s gun by the
44 barrel. The two “struggle[d] for control” of the gun. During the
45 struggle, the gun then “went off.” Defendant was “in shock that it
46 went off.” Garner had a “look of shock on his face.” Defendant did
47 not know the bullet had struck Garner.

1 Jesse Sandoval began to pursue defendant. Defendant pushed him
 2 away and started running. Defendant got into his car, but Sandoval
 3 prevented him from putting the car into drive. As the two struggled,
 4 defendant heard gunshots. Sandoval was “stunned because of the
 5 loudness” of the gunshots, enabling defendant to put the car into
 6 drive, causing Sandoval to fall out of the car.

7 Defendant drove away, and eventually dismantled his gun and
 8 threw out the barrel, clip and “the pen that holds the gun together.”
 9 Defendant learned Garner died and turned himself in the next
 10 morning.

11 (Doc. No. 18-18 at 4-11).

12 **IV. ANALYSIS**

13 Petitioner raised his insufficiency of evidence claim (Ground 4) on direct appeal
 14 (F074033). (Doc. No. 18-17 at 5-7). The Fifth Appellate District Court denied the ground. (Doc.
 15 No. 18-18 at 11-14). The California Supreme Court denied any relief. (Doc. No. 18-20).

16 Thereafter, Petitioner raised all grounds (Grounds 1-4) in a state petition for writ of habeas
 17 corpus filed in the Kern County Superior Court (HC-16486A). (Doc. No. 18-21). The Kern
 18 County Superior Court denied relief in a reasoned decision. (Doc. No. 18-22). Petitioner raised
 19 the same grounds in his state petition for writ of habeas corpus to the Fifth Appellate District
 20 Court (F081359). (Doc. No. 18-23). The Fifth Appellate District Court summarily denied relief.
 21 (Doc. No. 18-24). Petitioner also raised the same grounds in a state petition for writ of habeas
 22 corpus to the California Supreme Court (S265124). (Doc. No. 18-25). The California Supreme
 23 Court summarily denied the petition. (Doc. No. 18-26).

24 Thus, each of the grounds raised in the Petition are exhausted. The Court looks through to
 25 the last state court reasoned decision in evaluating each of Petitioner’s claims under the
 26 deferential standard of review. *Wilson*, 138 S. Ct. at 1192.

27 **A. Ground 1: *Brady* Violation**

28 In his first ground for relief, Petitioner argues that the state failed to turn over favorable
 2 evidence in violation of his Fifth Amendment due process rights and *Brady v. Maryland*, 373 U.S.
 3 83 (1963). (Doc. No. 1 at 5). Specifically, Petitioner claimed that the prosecution was in
 4 possession of his Sprint cell phone bill, which he argues proved that his wife did not call him the
 5 night of the shooting, thus, contradicting Sandra Ortiz’ testimony. (*Id.* at 21). Specifically,

1 Petitioner states that, as reflected on the Sprint cell phone bill attached to his Petition (Doc. No. 1
2 at 34-52, Exhibit 2), his cell phone number was 661-778-2344 and his wife's number was 661-
3 375-6704. Petitioner argues his Sprint cell phone bill shows that his wife's cell phone did not call
4 his cell phone on the night of February 14, 2015. (*Id.* at 21). Respondent argues that the state
5 court reasonably rejected the claim because the Sprint bill was not authenticated, there was no
6 evidence that the prosecution had the Sprint cell phone bill and defense did not, and a fair-minded
7 jurist could conclude that the evidence was not material as it did not contradict Ortiz's testimony,
8 and arguably confirmed it. (Doc. No. 17 at 24).

9 **1. State Court Decision**

10 Petitioner raised his *Brady* claim in his state habeas petition and submitted a copy of the
11 Sprint bill with his state habeas petition. (Doc. No. 18-21 at 4, 14-17, Exhibit 2). The last
12 reasoned decision on Petitioner's *Brady* claim was issued by the Kern County Superior Court.
13 The Court looks through the summary denials of this claim by the court of appeal and California
14 Supreme Court. The superior court found the claim factually not supported by record, and,
15 alternatively harmless.

16 **Any Failure of the State to Turnover Evidence is Harmless.**

17 Petitioner claims that the prosecution had received the phone billing
18 records for his and his wife's cell phones prior to trial and yet did
not turn them over to Petitioner.

19 The receipt of the phone records was actually noted on the Court's
20 docket in March and April of 2015. In September of 2015, the trial
21 court addressed a discovery motion by Petitioner's counsel wherein
the prosecution agreed that all exculpatory was to be produced to
Petitioner's counsel. There is no reason to presume that such
22 delivery of documents did not contain the cell phone bill
statements.

23 Petitioner has not provided any evidence in support of his
24 contention that the cell phone bills were not received by his
counsel.

25 Even if the cell phone records had not been delivered, the failure to
26 provide such was harmless. The cell phone billing records only
provide evidence that Petitioner and his wife were not billed for any
calls between their respective cell phones that night. Contrary to
Petitioner's position, it does not prove that the phone call never took
27 place.
28

1 (Doc. No. 18-22 at 3). As noted, both the state appellate and supreme court summarily denied
 2 Petitioner's state habeas petitions raising this same ground without opinion. (Doc. Nos. 18-24,
 3 26).

4 **2. Analysis**

5 "Under *Brady*, prosecutors are responsible for disclosing 'evidence that is both favorable
 6 to the accused and material either to guilt or to punishment.'" *Browning v. Baker*, 875 F.3d 444,
 7 459 (9th Cir. 2017) (quoting *United States v. Bagley*, 473 U.S. 667, 674 (1985)). "To establish a
 8 *Brady* violation, [Petitioner] must show: '(1) the evidence at issue is favorable to the accused,
 9 either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by
 10 the government, regardless of whether the suppression was willful or inadvertent; and (3) the
 11 evidence is material to the guilt or innocence of the defendant.'" *Sanders v. Cullen*, 873 F.3d
 12 778, 802 (9th Cir. 2017) (quoting *United States v. Sedaghaty*, 728 F.3d 885, 899 (9th Cir. 2013)).

13 The superior court's rejection of Petitioner's *Brady* claim was not objectively
 14 unreasonable. Despite not citing to *Brady*, the court found that Petitioner could not demonstrate
 15 the second *Brady* element. The court's records revealed that the cell phone records were listed in
 16 the discovery on the court's docket. (See Doc. No. 18-21 at 19, "Record of Case Events"
 17 reflecting "Subpoenaed Records Received From Sprint" on 03/17/15, 04/01/15 and 04/03/15).
 18 Further the issue of discovery was subject to a motion, that was later withdrawn by the defense.
 19 (See Doc. No. 18-1 at 84-128).³ And the record reveals the state agreed to re-produce all
 20 exculpatory evidence to the defense. (*Id.* at 105, ¶ 12.). There is no evidence to support
 21 Petitioner's claim that the state did not turn over the Sprint cell phone bill (to the extent it even
 22 constituted exculpatory evidence) to defense counsel or that defense counsel was unaware of the
 23 existence of the Sprint cell phone records. Thus, Petitioner cannot demonstrate that the state
 24 suppressed the Sprint cell phone records. Additionally, Petitioner does not explain why his own
 25 Sprint cell phone bill would not have been equally available to him. Indeed, "[t]he prosecution is
 26

27 ³ The discovery dispute arose due to Petitioner previously being represented by private counsel and
 28 subsequently being represented by the public defender, who apparently did not receive discovery from
 private counsel. Thus, the state recreated the discovery files and defense counsel withdrew the motion.

1 under no obligation to turn over materials not under its control.” *United States v. Aichele*, 941
 2 F.2d 761, 764 (9th Cir.1991). Thus, where a petitioner “had equal access” to the records in
 3 question he “cannot now complain that the State violated *Brady* at the habeas corpus stage ‘by not
 4 bringing the evidence to [his] attention.’” *Jones v. Ryan*, 733 F.3d 825, 838 (9th Cir. 2013)
 5 (quoting *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir.2006) (internal quotation marks omitted,
 6 finding no *Brady* violation where the petitioner “possessed the salient facts regarding the
 7 existence of the records that he claims were withheld”).

8 Alternatively, the superior court found that Petitioner could not demonstrate the first
 9 *Brady* element—that the Sprint bill was exculpatory. Specifically, the state court determined that
 10 the cell phone records were not exculpatory nor of impeaching value because the records did not
 11 contradict Ms. Ortiz’ testimony or disprove that the phone call took place. Evidence is “material”
 12 only if “there is a reasonable probability that, had the evidence been disclosed to the defense, the
 13 result of the proceeding would have been different.” *Strickler v. Greene*, 527 U.S. 263, 280
 14 (1999) (internal quotation marks omitted). “A ‘reasonable probability’ of a different result
 15 [exists] when the government’s evidentiary suppression undermines confidence in the outcome of
 16 the trial.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

17 Petitioner argues the cell phone records disprove Ms. Ortiz’s testimony that she saw and
 18 overheard Petitioner’s wife talking on a cell phone talking to someone and urging the person to
 19 hurry back. A review of the Sprint bill reflects that Petitioner’s cell phone (661-778-2344) placed
 20 two calls to his wife’s cell phone (661-375-6704) on the evening on February 14, 2015—one at
 21 11:16 p.m. and one at 11:18 p.m. (Doc. No. 1 at 47). According to the record, the shooting took
 22 place on February 14, 2015 at approximately 11:30 p.m. (Doc. No. 18-7 at 70:12-13; 71:16-28;
 23 71:3-9). Critical here, however, is that Ms. Ortiz testified only that she overheard Petitioner’s
 24 wife speaking to someone, but she did not specify with whom Petitioner’s wife was speaking.
 25 (Doc. No. 18-8 at 174:2-3). Thus, the state court’s rejection of this ground finding that the cell
 26 phone bills do not disprove Ortiz’ testimony of what she overheard Petitioner’s wife saying to
 27 someone on a cell phone is reasonably objective.

28 And finally, as discussed more fully *infra*, even assuming that the cell phone bills had

1 been introduced to impeach Ortiz's testimony, given the ample evidence that Petitioner acted with
2 malice, there is not a reasonable probability that the result of the proceedings would have been
3 any different. *United States v. Bagley*, 473 U.S. 667 (1985). Thus, the undersigned finds that that
4 the state court's rejection of this ground was not contrary to nor an unreasonable application of
5 federal law, nor based on an unreasonable application of the facts so Petitioner is not entitled to
6 relief on his *Brady* claim.

7 **B. Ground 2: Prosecutorial Misconduct**

8 Petitioner contends he was denied due process and a fair trial because the state prosecutor
9 committed prosecutorial misconduct by knowingly putting on perjured testimony. (Doc. No. 1 at
10 7). In support, Petitioner again relies upon the Sprint cell phone records, which he claims were in
11 the prosecutor's possession, dispute Ms. Ortiz' testimony and points to the fact that the prosecutor
12 nonetheless permitted Ms. Ortiz to testify about statements she overheard by Petitioner's wife
13 while on a cell phone. (*Id.* at 23-24). In response, Respondent argues that the state court's
14 rejection of the claim was not objectively unreasonable. (Doc. No. 17 at 33).

15 **1. State Court Decision**

16 Petitioner raised his prosecutorial misconduct claim in his state habeas petition. (Doc. No.
17 18-21 at 5, 41-42). The last reasoned decision on Petitioner's prosecutorial misconduct claim was
18 issued by the Kern County Superior Court. The Court looks through the summary denials of this
19 claim by the court of appeal and California Supreme Court.

20 **There is No Evidence That Testimony Was Known to be False.**

21 Petitioner claims that the testimony of Sandra Ortiz regarding
22 overhearing his wife talk on the cell phone constituted perjury, and
23 the prosecution knew it before they put Sandra Ortiz on the stand.
24 Even assuming the testimony was false, Petitioner has not provided
any evidence that the prosecution knew it was false when Sandra
Ortiz was put on the stand.

25 The veracity of Sandra Ortiz's story was fully addressed in the trial
26 and on appeal. The Court of Appeal decision even provides in a
27 footnote that the fact that Sandra Ortiz did not mention overhearing
the phone conversation when she was first interviewed by police
shortly after the incident. The credibility or lack thereof of Sandra
Ortiz was addressed at trial. The jury had all the evidence it needed
28 to determine if Sandra Ortiz was being truthful in her testimony.

Finally, there is no new evidence that Sandra Ortiz's story is any weaker now than it was at the time of trial. The cell phone records only provide evidence that Petitioner and his wife were not billed for any calls between their respective cell phones that night. Contrary to Petitioner's assertion, the new evidence does not "prove" that the call testified to by Sandra Ortiz never took place.

(Doc. No. 18-22 at 3).

2. Analysis

“[I]mplicit in any concept of ordered liberty,” is that the State may not use false evidence to obtain a criminal conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (internal citation omitted). Additionally, a state violates a criminal defendant's right to due process when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears. *See Alcorta v. Texas*, 355 U.S. 28 (1957). To prevail on *Napue* claim, “the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) ... the false testimony was material.” *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal quotations and citations omitted).

Unlike a *Brady* violation, because cases of prosecutorial misconduct involve “corruption of the truth-seeking function of the trial process” a *Napue* inquiry requires only that there be “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Dickey v. Davis*, 69 F.4th 624, 636-37 (9th Cir. 2023) (quoting *U.S. v. Agurs*, 427 U.S. 97, 103–04 (1976); *accord Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005) (en banc)).

Here, without citing to any caselaw, the state court disposed of this ground on the basis that Petitioner failed to produce conclusive evidence that Ms. Ortiz’s trial testimony was false or that the prosecutor knew it was false. The state court further noted that Ortiz was subject to cross-examination. Because the state court adjudicated this claim on the merits, to find relief in the federal court Petitioner must show that the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

The Court agrees with the state superior court that Petitioner offers no conclusive evidence that Ms. Ortiz's trial testimony was dishonest or that the prosecutor knew it was

1 dishonest. As noted above, the Sprint cell phone bill does did not disprove Ortiz's testimony
 2 concerning the statements' she attributed to Petitioner's wife when she claimed to have overheard
 3 Petitioner's wife speaking to someone on a cell phone. To the extent that Ms. Ortiz's testimony
 4 was not supported by other witnesses or the fact that she failed to disclose overhearing the
 5 statements that evening to police, mere inconsistencies in the evidence does not constitute the
 6 knowing use of perjured testimony by the prosecutor. *United States v. Geston*, 299 F.3d 1130,
 7 1135 (9th Cir. 2002); *see also United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997). Here,
 8 the record does not support the first element of a *Napue* violation—that Ortiz's testimony was
 9 false. Furthermore, even if Petitioner can show Ortiz testified falsely, there is no evidence that
 10 the state prosecutor had any reason to believe that Ortiz's testimony was false. Thus, the state
 11 court's rejection of this claim was objectively reasonable and Ground Two is without merit.

12 **C. Ground 3(a) and (b): Ineffective Assistance of Trial and Appellate Counsel**

13 In his third ground Petitioner contends that both trial and appellate counsel rendered
 14 constitutionally ineffective assistance.⁴ (Doc. No. 1 at 8). Petitioner faults his trial counsel for (i)
 15 failing to use the Sprint cell phone bill in his defense; (ii) failing to conduct a reasonable pre-trial
 16 investigation regarding the Sprint cell phone bill; and (iii) failing to object to Sandra Ortiz's
 17 second statement. (*Id.*, 8, 25-26). Petitioner faults his appellate counsel for (i) failing to use the
 18 Sprint cell phone bill on direct appeal, which Petitioner claims was "new found evidence"; and (ii)
 19 for failing to file a state petition for writ of habeas corpus regarding the Sprint cell phone bill.
 20 (*Id.*). Petitioner attaches correspondence between him and appellate counsel to his Petition in
 21 support of his claim. (Doc. No. 1 at 65-73, Exhs. 8-11). Respondent argues the state court's
 22 rejection of Petitioner's claims regarding trial counsel was objectively reasonable. (Doc. No. 25
 23 at 37-40). Respondent similarly argues that the state court's rejection of the claim regarding
 24 appellate counsel was objectively reasonable because the Sprint cell phone was outside the record
 25 on appeal so it could not have been raised on direct appeal and Petitioner does not have a
 26 constitutional right to appellate counsel on collateral appeal. (*Id.* at 40-41).

27
 28 ⁴ Although the state court addressed the grounds together, Petitioner raised each ground as
 distinct sub-grounds in Ground Three of his Petition. (Doc. No. 1 at 8).

1 **1. State Court Decision**

2 Petitioner raised his ineffective assistance of trial and appellate counsel claim in his state
 3 habeas petition and submitted a copy of the Sprint bill with his state habeas petition. (Doc. No.
 4 18-21 at 5, 41-42). The last reasoned decision was issued by the Kern County Superior Court.
 5 The Court looks through the summary denials of this claim by the court of appeal and California
 6 Supreme Court.

7 **Trial and Appellate Counsel Did Not Provide Ineffective
 8 Assistance.**

9 "An ineffective assistance claim has two components: A petitioner
 10 must show that counsel's performance was deficient, and that the
 11 deficiency prejudiced the defense." (*Wiggins v. Smith* (2003) 539
 12 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471; accord, *Strickland*
 13 v. *Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80
 14 L.Ed.2d 674 (*Strickland*).) Whether counsel's performance was
 15 deficient, and whether any deficiency prejudiced defendant, are
 16 mixed questions of law and fact subject to our independent review.
 17 (*In re Thomas*, *supra*, 37 Cal.4th at p. 1256, 39 Cal.Rptr.3d 845,
 18 129 P.3d 49.)

19 To obtain relief, a defendant must demonstrate "a reasonable
 20 probability that, but for counsel's unprofessional errors, the result of
 21 the proceeding would have been different. A reasonable probability
 22 is a probability sufficient to undermine confidence in the outcome."
 23 (*Strickland*, *supra*, 466 U.S. at p. 694, 104 S.Ct. 2052; accord,
 24 *People v. Rices* (2017) 4 Cal.5th 49, 80, 226 Cal.Rptr.3d 118, 406
 25 P.3d 788; *Gay I*, *supra*, 19 Cal.4th at p. 790, 80 Cal.Rptr.2d 765,
 968 P.2d 476.)

26 Counsel's performance is evaluated according to well-established
 27 standards.

28 "Counsel also has a duty to bring to bear such skill and knowledge
 29 as will render the trial a reliable adversarial testing process."
 30 (*Strickland*, *supra*, 466 U.S. at p. 688, 104 S.Ct. 2052.) "These
 31 basic duties neither exhaustively define the obligations of counsel
 32 nor form a checklist for judicial evaluation of attorney
 33 performance." (*Ibid.*) Rather, "[t]o establish deficient performance,
 34 a petitioner must demonstrate that counsel's representation 'fell
 35 below an objective standard of reasonableness,' 'as measured by'
 36 'prevailing professional norms.' ("*Wiggins v. Smith*, *supra*, 539 U.S.
 37 at p. 521, 123 S.Ct. 2527, quoting *Strickland*, at p. 688, 104 S.Ct.
 38 2052.)

39 When applying this standard, we ask whether any reasonably
 40 competent counsel would have done as counsel did. (*In re Reno*
 41 (2012) 55 Cal.4th 428, 465, 146 Cal.Rptr.3d 297, 283 P.3d 1181.)
 42 Counsel's performance "is assessed according to the prevailing

1 norms at the time." (*In re Thomas*, supra, 37 Cal.4th at p. 1257, 39
 2 Cal.Rptr.3d 845, 129 P.3d 49.)

3 Judicial review of counsel's performance is deferential; to establish
 4 deficient performance, the defendant "must overcome the
 5 presumption that, under the circumstances, the challenged action
 6 'might be considered sound trial strategy.' " (*Strickland*, at p. 689,
 7 104 S.Ct. 2052.)

8 As recently stated by the California Supreme Court in the case of *In
 9 re Gay*, (2020) 8 Cal.5th 1059:

10 Because a petition for a writ of habeas corpus is a collateral
 11 attack on a presumptively final criminal judgment,
 12 Petitioner bears the burden of proving his entitlement to
 13 relief by a preponderance of the evidence. (*In re Cowan*
 14 (2018) 5 Cal.5th 235, 243, 234 Cal.Rptr.3d 75, 419 P.3d 535;
 15 *In re Price* (2011) 51 Cal.4th 547, 559, 121 Cal.Rptr.3d
 16 572, 247 P.3d 929.) The trial court's factual findings are
 17 "entitled to great weight where supported by substantial
 18 evidence." (*In re Hamilton* (1999) 20 Cal.4th 273, 296, 84
 19 Cal.Rptr.2d 403, 975 P.2d 600; accord, *In re Welch* (2015)
 20 61 Cal.4th 489, 501, 189 Cal.Rptr.3d 179, 351 P.3d 306.)
 21 Those findings are not, however, conclusive, and "we can
 22 depart from them upon independent examination of the
 23 record even when the evidence is conflicting." (*Hamilton*,
 24 at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600; accord,
 25 *Cowan*, at p. 243, 234 Cal.Rptr.3d 75, 419 P.3d 535.) The
 26 ultimate responsibility for determining whether Petitioner is
 27 entitled to relief rests with this court. (*In re Thomas* (2006)
 28 37 Cal.4th 1249, 1256-1257, 39 Cal.Rptr.3d 845, 129 P.3d
 49.)

17 Petitioner claims that both his trial and appellate counsel were
 18 ineffective because they both failed to present the cell phone billing
 19 records in support of the position that Petitioner had no malice of
 20 forethought when the victim was killed.

21 Petitioner further faults his trial counsel for not investigating the
 22 cell phone billing records himself and failing to object to the
 23 testimony of Sandra Ortiz.

24 Petitioner does not provide any evidence that his trial counsel failed
 25 to investigate the cell phone records or that counsel did not actually
 26 receive the records from the prosecution and strategically decided
 27 not to introduce the evidence. The evidence presented at trial
 28 regarding the malice of forethought of Petitioner included the
 testimony of Petitioner himself. It is unlikely that the addition of the
 cell phone records into evidence in the case would have swayed the
 jury away from the verdict against Petitioner.

27 The testimony of Sandra Ortiz about the cell phone call was
 28 objected to at trial and her testimony was deemed admissible as an
 exception to the hearsay rule by the Court of Appeals. There was no

1 failure by counsel in allowing the testimony to proceed
2 unquestioned.

3 As described below, Sandra Ortiz's testimony also was not the only
4 evidence of Petitioner's malice of forethought. Everything about the
5 cell phone call by Petitioner's wife could be ignored and still there
6 would be sufficient evidence in support of the verdict.

7 Petitioner has not shown that there is a reasonable probability that
8 the result of the proceeding would have been different if the cell
9 phone billing records had been introduced at trial.

10 The Court finds Petitioner fails to meet his burden to show a prima
11 facie case for habeas corpus relief.

12 (Doc. No. 18-22 at 4-5).

13 2. Analysis

14 Criminal defendants have a right to counsel at trial and on direct appeal. U.S. Const.
15 Amend VI. Claims alleging that trial or appellate counsel were constitutionally ineffective
16 requires the Court to engage in the two-step analysis set forth in *Strickland v. Washington*, 466
17 U.S. 668 (1984). Under the first prong of that test, the petitioner must prove that his attorney's
18 representation fell below an objective standard of reasonableness. *Id.* at 687-88. To demonstrate
19 deficient performance, the petitioner must show his counsel "made errors so serious that counsel
20 was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at
21 687; *Williams v. Taylor*, 529 U.S. 362, 391 (2000). In reviewing trial counsel's performance,
22 however, "counsel is strongly presumed to have rendered adequate assistance and made all
23 significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at
24 690; *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Only if counsel's acts and omissions,
25 examined within the context of all the circumstances, were outside the "wide range" of
26 professionally competent assistance, will petitioner meet this initial burden. *Kimmelman v.*
27 *Morrison*, 477 U.S. 365, 386 (1986); *Strickland*, 466 U.S. at 689-90.

28 Under the second part of *Strickland*'s two-prong test, the petitioner must show that he was
29 prejudiced by counsel's conduct. 466 U.S. at 694. Prejudice is found where there is a reasonable
30 probability that, but for his counsel's errors, the result would have been different. *Id.* The errors
31 must not merely undermine confidence in the outcome of the trial but must result in a proceeding

1 that was fundamentally unfair. *Williams*, 529 U.S. at 393 n.17; *Lockhart v. Fretwell*, 506 U.S.
2 364, 372 (1993). The petitioner must prove both prongs: deficient performance and prejudice. A
3 court need not, however, determine whether counsel's performance was deficient before
4 determining whether the petitioner suffered prejudice as the result of the alleged deficiencies.
5 *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of
6 lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

7 **a. Trial Counsel**

8 Here, the state court correctly identified and applied the two-prong *Strickland* analysis in
9 disposing of Petitioner's trial and appellate ineffective assistance of counsel claims. The state
10 court disposed of Petitioner's claims that trial counsel was constitutionally ineffective on both
11 prongs. First, the state court found no evidence that trial counsel was unaware of the Sprint cell
12 phone bill. As discussed *supra* at 13, the trial court docket reflected that the cell phone bills were
13 listed in the discovery on the court's docket. Although "counsel has a duty to make reasonable
14 investigations or to make a reasonable decision that makes particular investigations unnecessary,"
15 *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690–91), the state
16 court record does not support Petitioner's claim that his trial lawyer abdicated this duty. Thus,
17 the state court's conclusion that Petitioner did not affirmatively show counsel "failed" to do what
18 he may have done and did not "establish" deficiency was reasonable. *Burt v. Titlow*, 134 S. Ct.
19 10, 17 (2013).

20 It is equally likely that trial counsel made a strategic decision not to use the Sprint cell
21 phone bill as it did not unambiguously impeach Ms. Ortiz's testimony. Instead, defense counsel
22 chose to challenge Ortiz's testimony by introducing evidence that Ortiz did not mention
23 overhearing any conversation by Sabrina Martinez when she was first interviewed by police on
24 the night of the incidence (Doc. No. 18-10 at 21:8-28, at 22:1-2). Trial counsel also elicited from
25 Petitioner on direct examination that his wife had left her cell phone in his car after he had been
26 ejected from the party. (Doc. No. 18-10 at 104:11-18). And trial counsel elicited testimony from
27 Petitioner's wife, Sabrina Martinez, that she did not have her call phone on her after she left the
28 house the second time after getting into a fight with her niece. (Doc. No. 18-9 at 216:1-12).

1 Regardless, Petitioner cannot prevail on the prejudice prong given the weight of evidence even if
2 he can show counsel was deficient for not using the cell phone bill to discredit Ortiz's testimony.

3 Finally, the record reflects that trial counsel did raise a hearsay objection to Ortiz's first
4 statement that was overruled. (Doc. No. 18-8 at 173:9-28, at 174:1-5). Although counsel did not
5 object to the Ortiz's second statement (Doc. No. 18-8 at 174: 11-20) and despite not being
6 preserved, both of Ortiz's statements were raised on direct appeal and the state appellate court
7 found both statements were properly admitted. (Doc. No. 18-18 at 14-16). Thus, had trial
8 counsel objected to the second statement, the objection likely would have been overruled.

9 Counsel cannot be deemed defective for failing to raise a futile objection. *See Miller v. Keeney*,
10 882 F.2d 1428, 1434 (9th Cir.1989) (noting when a petitioner challenges a futile objection, he
11 fails both *Strickland* prongs).

12 Thus, the state court's rejection of Petitioner's ineffective assistance of trial counsel
13 claims was not objectively unreasonable under AEDPA and Petitioner is not entitled to relief on
14 these claims.

15 **b. Appellate Counsel**

16 Other than referencing the correct *Strickland* standard and denying relief, the superior
17 court does not further address Petitioner's claim of ineffective assistance of appellate counsel. To
18 succeed on a claim of ineffective assistance of appellate counsel "the petitioner [must]
19 demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue.
20 *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Wildman v. Johnson*, 261 F.3d 832, 841-42 (9th Cir.
21 2001). Further, consistent with *Strickland*, the petitioner must show prejudice, which in the
22 context of appellate counsel means that the petitioner must demonstrate a reasonable probability
23 that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in
24 his appeal. *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010).

25 The denial of Petitioner's appellate counsel's claim by the state court was objectively
26 reasonable. Indeed, as noted by appellate counsel in his September 9, 2019 letter to Petitioner,
27 counsel could not have raised the Sprint cell phone bill on direct appeal because the bill was not
28 introduced at trial and evidence outside of the trial record may not be considered on direct appeal

1 under California law. (Doc. No. 1 at 73). Under California law, claims on direct review are
 2 limited to issues raised in the record. *In re Carpenter*, 9 Cal. 4th 634, 646 (1995) (“Appellate
 3 jurisdiction is limited to the four corners of the record on appeal.”). *See Shin v. Ndoh*, 2021 WL
 4 12143814, at *4 (C.D. Cal. May 27, 2021) (collecting California cases). *see also Franz v.*
 5 *Stinson*, 58 F. Supp. 2d 124, 128 (S.D.N.Y. 1999) (appellate counsel is not deficient for not
 6 pursuing claims unsupported by the record). Thus, Petitioner’s claims concerning the Sprint
 7 phone bill could not be raised on direct appeal because the claim necessarily required a factual
 8 development of the record. Appellate counsel cannot be deemed ineffective for failing to raise a
 9 nonmeritorious claim. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (“the failure to take a
 10 futile action can never be deficient performance”).

11 Additionally, Petitioner’s claim that appellate counsel was ineffective for not raising the
 12 Sprint cell phone claim on his behalf via a state habeas petition is without merit because counsel
 13 was not appointed to represent Petitioner on collateral review. (Doc. No. 1 at 73, advising
 14 Petitioner his appointment “does not include the investigation and appointment of a habeas
 15 petition”). Further, while Petitioner has a right to counsel on direct appeal after a criminal
 16 conviction, he has not right to counsel in when seeking “post-conviction” such as in a state habeas
 17 petition. *Coleman v. Thompson*, 501 U.S. 722, 752-57 (1991); *see also Pennsylvania v. Finley*,
 18 481 U.S. 551, 555, 557 (1987) (“Postconviction relief . . . is a collateral attack that normally
 19 occurs only after the defendant has failed to secure relief through direct review of his conviction”;
 20 prisoner has no constitutional right to counsel “when attacking a conviction that has long since
 21 become final upon exhaustion of the appellate process”). And because Petitioner “had no
 22 constitutional right to counsel, he could not be deprived of the effective assistance of counsel.”
 23 *Wainwright v. Torna*, 455 U.S. 586, 588 (1982).

24 Thus, Petitioner fails to demonstrate that appellate counsel was deficient for not raising
 25 the Sprint phone bill on direct appeal since such evidence was outside the record. And because
 26 Petitioner does not enjoy the right to appellate counsel on collateral post-conviction relief, he
 27 cannot show any deprivation of effectiveness by appellate counsel. For these reasons, Petitioner is
 28 not entitled to relief on his ineffective assistance of appellate counsel claims.

D. Ground 4: Insufficient Evidence of Malice Aforethought

In his final ground for relief, Petitioner claims his due process rights were violated because there was insufficient evidence of malice aforethought for the jury to have convicted him of second-degree murder. (Doc. No. 1 at 10). Petitioner argues that absence of self-defense of self or another was not proved beyond a reasonable doubt. (*Id.* at 28). Further, Petitioner argues that the evidence the jury relied upon included improperly admitted statements that were attributed to his wife because such statements were hearsay and were prejudicial. (*Id.*). In response, Respondent argues Petitioner fails to demonstrate that the state court's rejection of this claim was objectively unreasonable. (Doc. No. 17 at 41-45).

1. State Court Decisions

Petitioner raised this ground on direct appeal. (Doc. No. 18-15). In an opinion undisturbed by the California Supreme Court, the appellate court rejected Petitioner’s insufficiency claim in a reasoned decision.

Substantial Evidence of Malice was Adduced at Trial

Defendant argues there was insufficient evidence of malice to sustain his conviction for second-degree murder.

Law

“Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.]” (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) Manslaughter is an unlawful killing without malice. (*Ibid.*)

One who kills with ““the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury – is guilty only of manslaughter.’ [Citation.]” (*People v. Trujeque* (2015) 61 Cal.4th 227, 270.) This is called “imperfect defense of others.” However, it “is not a true defense, but a shorthand description for a form of voluntary manslaughter. [Citations.]” (*Id.* at p. 271.)

If the issue of imperfect self-defense is properly presented in a murder case, the prosecution must prove the absence of imperfect self-defense beyond a reasonable doubt. (*People v. Rios* (2000) 23 Cal.4th 450, 462.) The parties agree the same rule applies to imperfect defense of others.

1 Defendant argues the prosecution failed to prove he did not kill
2 with the actual belief he needed to defend himself or his wife.

3 “In reviewing a challenge to the sufficiency of the evidence..., we
4 review the entire record in the light most favorable to the judgment
5 to determine whether it discloses substantial evidence – that is,
6 evidence that is reasonable, credible, and of solid value – from
7 which a reasonable trier of fact could have found the defendant
8 guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Ramirez*
9 (2006) 39 Cal.4th 398, 464.) We “‘presume[] in support of the
10 judgment the existence of every fact the trier could reasonably
11 deduce from the evidence.’ [Citation.]” (*Ibid.*)

12 **Application**

13 We conclude there was substantial evidence from which a
14 reasonable jury could have found that defendant did not kill
15 because of an actual belief in the need to defend himself or his wife.

16 **1. Substantial Evidence of Malice**

17 There was evidence that after allegedly hearing his wife scream in
18 the Espinoza residence, defendant left the property, got into his car,
19 drove to his home, retrieved a gun, and drove back to where he had
20 heard his wife scream. Because of its inherent implausibility, the
21 jury was free to discredit defendant’s testimony about why he left to
22 retrieve his gun. As a result, the jury was free to infer that defendant
23 actually left to retrieve the gun because he was angry with Arcadio,
24 Friend Angel and possibly others at the Espinoza residence.

25 Other evidence bolsters the inference that defendant sought to kill
26 people at the Espinoza residence out of revenge, anger and/or
27 embarrassment rather than to defend himself or his wife. Defendant
28 was physically removed from the Espinoza residence after fighting
with Arcadio. As he was pushed out the front door, defendant said
to Arcadio, “You stupid mother f***ker. I’m going to get you. Just
wait and see. I’m going to get you.” Another witness heard
defendant say he would come back and hurt people in the house.
Specifically, he said, “I will be back; so you guys watch out.” These
statements raise an inference defendant subsequently acted out of
anger, not fear.

29 Defendant’s wife, Sabrina Martinez, was also removed from the
30 property after getting into a fight. A witness saw her talking on a
31 cell phone, and heard her say, “You better hurry up, these mother
32 f***kers think they are going to laugh at us.” While still on the
33 phone, Sabrina Martinez made a comment “toward” the Espinoza
34 residence, saying, “We are going to come back and shoot all you
35 mother f***kers.” One reasonable inference from this evidence is
36 that Sabrina Martinez was talking to defendant on the phone, and
37 that they discussed shooting people at the Espinoza residence
38 because they were angry that people thought they could laugh at
39 defendant and his wife. That inference supports the jury’s
40 conclusion that defendant harbored malice when he shot Garner.

1 2. **Defendant's Arguments to the Contrary are Unavailing**

2 Defendant contends that it would have been reasonable for him to
 3 be in fear considering that he knew his wife was in a house with
 4 known gang members at least some of whom were hostile; and he
 5 knew that gang members can violently escalate situations.
 6 Defendant also observes that he did not immediately begin shooting
 7 when he arrived back at the Espinoza residence; that events after
 8 the shooting confirmed the reasonableness of his fear that gun
 9 violence could erupt; and that fleeing the scene and discarding parts
 10 of the gun could be explained by "shock" and his desire to escape
 11 the people chasing him. At best, defendant's arguments suggest
 12 some of the circumstances of that night could also be consistent
 13 with imperfect self-defense or imperfect defense of others. Such a
 14 contention fails under our substantial evidence standard of review.
 15 "'If the circumstances reasonably justify the trier of fact's findings,
 16 reversal of the judgment is not warranted simply because the
 17 circumstances might also reasonably be reconciled with a contrary
 18 finding.' [Citation.] (*People v. Westerfield* (2019) 6 Cal.5th 632,
 19 713.)

20 (Doc. No. 18-18 at 11-14).

21 Petitioner re-raised this ground in his state habeas petitions (Doc. Nos. 18-21, 18-23, 18-
 22 25) and it was rejected by the Kern County Superior Court, the Fifth District Court of Appeal and
 23 California Supreme Court. (Doc. Nos. 18-22, 18-24, 18-26). The Superior Court, recognizing the
 24 ground was already addressed and rejected on direct appeal, concluded that:

25 [e]ven if the phone call and all statements of Petitioner's wife
 26 alleged to have been overheard by Sandra Ortiz were to be ignored,
 27 there was still sufficient evidence in support of a finding of malice
 28 of forethought by Petitioner.

29 The evidence of the inference that Petitioner actually sought to kill
 30 people at the gathering out of revenge, anger or embarrassment
 31 included the fact that Petitioner left the gathering after he had been
 32 in a fight and as he left he said; "You stupid mother :f[**]ker. I'm
 33 going to get you. Just wait and see. I'm going to get you." He was
 34 also heard saying "I will be back; so you guys watch out."

35 Samantha, who remained at the gathering after Petitioner had been
 36 ejected from the gathering, had gotten a phone call from Anthony,
 37 who lived with Petitioner, saying Petitioner "came for his gun, and
 38 is on his way back."

39 Petitioner testified at his trial and admitted that, after he and his
 40 wife left the gathering, Petitioner and his wife returned together but
 41 he did not go inside. His story was that when he heard his wife
 42 scream from inside, Petitioner feared for her life and at that point
 43 decided to drive home and get his gun. Petitioner's plan was to get
 44 his wife and "get the hell out of there." He claims the victim
 45 grabbed the gun and caused it to discharge.

1 Others testified that when Petitioner arrived back at the gathering
 2 he was confronted by the victim at the front door. Defendant said
 3 "What are you looking for, bro? Are you looking for this?" and then
 4 Petitioner pulled out a gun. The victim tried to prevent Petitioner
 5 from entering the residence and during their scuffle the gun
 6 discharged. The victim immediately fell and it was later determined
 7 that he died from a bullet pierced his heart.

8 Petitioner testified that he was in shock after the shooting and,
 9 while he drove away from the gathering, he dismantled the gun and
 10 threw out the barrel, clip and "the pen that holds the gun together."

11 The jury apparently did not believe Petitioner's defense that he
 12 needed to kill because of an actual belief in the need to defend
 13 himself or his wife. The jury did not believe Petitioner lacked the
 14 malice of forethought as needed for a conviction for second degree
 15 murder.

16 Any evidence regarding the questioned overheard phone
 17 conversation of his wife after Petitioner was ejected from the
 18 gathering was simply superfluous evidence of malice. Petitioner's
 19 own words spoken to others was sufficient in and of itself.

20 (Doc. No. 18-22 at 5-6).

2. Analysis

21 The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from
 22 conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the
 23 crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The federal standard
 24 for determining the sufficiency of the evidence to support a jury finding is set forth in *Jackson v.*
 25 *Virginia*, 443 U.S. 307 (1979). Under *Jackson*, "the relevant question is whether, after viewing
 26 the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have
 27 found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in
 28 original); *see also Coleman v. Johnson*, 566 U.S. 650, 656 (2012) ("the only question under
Jackson is whether that finding was so insupportable as to fall below the threshold of bare
 29 rationality"); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (a reviewing court "may set aside the jury's
 30 verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed
 31 with the jury").

32 The *Jackson* standard "must be applied with explicit reference to the substantive elements
 33 of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16; *Juan H. v. Allen*,

1 408 F.3d 1262, 1275-76 (9th Cir. 2005). The reviewing court should look to state law for the
 2 elements of the offense and then turn to the federal question of whether any rational trier of fact
 3 could have found the essential elements of the crime supported by sufficient evidence beyond a
 4 reasonable doubt. *See Johnson v. Montgomery*, 899 F.3d 1052, 1056 (9th Cir. 2018).

5 Further, when both *Jackson* and AEDPA apply to the same claim, the claim is reviewed
 6 under a “twice-deferential standard.” *Parker v. Matthews*, 567 U.S. 37, 43 (2012). As noted by
 7 the Supreme Court:

8 First, on direct appeal, “it is the responsibility of the jury—not the
 9 court—to decide what conclusions should be drawn from evidence
 10 admitted at trial. A reviewing court may set aside the jury’s verdict
 11 on the ground of insufficient evidence only if no rational trier of
 12 fact could have agreed with the jury.” And second, on habeas
 13 review, “a federal court may not overturn a state court decision
 14 rejecting a sufficiency of the evidence challenge simply because the
 15 federal court disagrees with the state court. The federal court
 16 instead may do so only if the state court decision was ‘objectively
 17 unreasonable.’”

18 *Coleman*, 566 U.S. at 651.

19 Here, the jury rejected the first-degree murder charge and lesser-included offense of
 20 involuntary manslaughter, finding Petitioner instead guilty of second-degree murder. California
 21 law defines second degree murder as the unlawful killing of a human being with malice
 22 aforethought, but without additional elements that would support a conviction for first degree
 23 murder. *See People v. Chun*, 45 Cal. 4th 1172, 1181 (2009). Malice may be express or implied.
 24 *People v. Beltran*, 56 Cal. 4th 935, 941 (2013). An unlawful killing committed without malice is
 25 manslaughter, not murder. Penal Code § 192 (defining voluntary manslaughter as the unlawful
 26 killing of a human being without malice); *People v. Thomas*, 53 Cal.4th 771, 813 (2012)
 27 (manslaughter is a lesser included offense of murder), *cert. denied*, 133 S.Ct. 380 (2012).

28 Self-defense can be “perfect” or “imperfect.” A killing in “perfect self-defense”
 29 exonerates a defendant completely but the defendant “must actually *and* reasonably believe in the
 30 necessity of defending [himself] from imminent danger of death or great bodily injury.” *People*
 31 *v. Randle*, 35 Cal.4th 987, 994 (2005) (italics in original), *overruled on other grounds by People*
 32 *v. Sarun Chun*, 45 Cal.4th 1172 (2009). “Imperfect self-defense” refers to an actual but

1 objectively unreasonable belief that deadly force is necessary to defend oneself or another person
 2 so that the defendant's actions are without malice but resulted in a conviction of voluntary
 3 manslaughter instead of murder. *Randle*, 35 Cal.4th at 994–95. “[T]he ultimate test of
 4 reasonableness is objective” and turns on “whether a reasonable person in defendant's position
 5 would have believed in the need to [to kill to prevent imminent harm] consider[ing] all of the
 6 relevant circumstances in which defendant found [himself].” *People v. Humphrey*, 13 Cal.4th
 7 1073, 1087 (1996). Both perfect and imperfect self-defense require that the belief in the need to
 8 defend be precipitated by fear of imminent harm; “[f]ear of future harm – no matter how great the
 9 fear and no matter how great the likelihood of the harm – will not suffice. The defendant's fear
 10 must be of *imminent* danger to life or great bodily injury.” *Id.* at 1082 (internal quotations and
 11 citations omitted).

12 Here, the Court of Appeal reasonably determined there was sufficient evidence to support
 13 a finding of malice within the meaning of California law. Petitioner does not explain how the
 14 state court decision was objectively unreasonable under controlling federal law. Even putting the
 15 statements that were attributed to his wife aside,⁵ the record reveals sufficient evidence that
 16 Petitioner acted out of anger and not out of concern for his wife's imminent safety. Petitioner
 17 admitted he was fighting at the party and was clearly angry by being forcibly removed from the
 18 premises. There was testimony that Petitioner made express threats when he left as to what
 19 would happen when he returned. Petitioner admitted to driving 2 ½ miles to retrieve a gun after
 20 he heard his wife screaming instead of immediately entering the house to check on his wife or
 21 calling 911 to contact the police despite his cell phone being in his pocket. Anthony Martinez,
 22 who lived with Petitioner, called Samantha to warn them that Petitioner had retrieved a gun and
 23 was heading back. Petitioner immediately pulled out a gun when confronted at the door, which
 24 further reflects that he was angry and intended retribution for his earlier eviction. The jury was
 25 charged on first-degree murder, second-degree murder, and voluntary manslaughter. The jury
 26 had before it, and presumably considered, all the testimony as to Petitioner's state of mind, and

27
 28

 5 Petitioner raised the hearsay objections on direct appeal. The appeals court found the statements did not
 constitute hearsay and found no trial court error by admitting the statements. (Doc. No. 18-18 at 13-15).

1 rejected Petitioner's claim that he was acting in defense of his wife when they chose not to
2 convict Petitioner of the lesser included offense of manslaughter and instead convict him of
3 second-degree murder. (Doc. No. 18-2 at 12, 14).

4 Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact
5 could have found beyond a reasonable doubt that Petitioner harbored malice to be convicted of
6 second-degree murder as defined under California law. As such, the state court's rejection of this
7 claim was not contrary to, or an unreasonable application of, clearly established Supreme Court
8 precedent, nor was it based on an unreasonable determination of the facts. The undersigned
9 recommends that ground four be denied.

10 **V. CERTIFICATE OF APPEALABILITY**

11 A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district
12 court's denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253;
13 *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing § 2254 Cases requires a
14 district court to issue or deny a certificate of appealability when entering a final order adverse to a
15 petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th
16 Cir. 1997). A certificate of appealability will not issue unless a petitioner makes "a substantial
17 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires
18 the petitioner to show that "jurists of reason could disagree with the district court's resolution of
19 his constitutional claims or that jurists could conclude the issues presented are adequate to
20 deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *accord Slack v.*
21 *McDaniel*, 529 U.S. 473, 484 (2000). Because the petitioner has not made a substantial showing
22 of the denial of a constitutional right, the undersigned recommends that the court decline to issue
23 a certificate of appealability.

24 Accordingly, it is **RECOMMENDED**:

25 1. Petitioner's Petition for Writ of Habeas Corpus (Doc. No. 1) be denied; and
26 2. Petitioner be denied a certificate of appealability.

27 **NOTICE TO PARTIES**

28 These Findings and Recommendations will be submitted to the United States District

1 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
2 after being served with a copy of these Findings and Recommendations, a party may file written
3 objections with the Court. *Id.*; Local Rule 304(b). The document should be captioned,
4 “Objections to Magistrate Judge’s Findings and Recommendations.” The assigned District Judge
5 will review these Findings and Recommendations under 28 U.S.C. § 636(b)(1)(C). A party’s
6 failure to file objections within the specified time may result in the waiver of certain rights on
7 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Dated: October 4, 2024



HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE